STATE OF MICHIGAN

COURT OF APPEALS

WILL ROGERS,

Plaintiff-Appellee/
Cross-Appellant,

v

DAVID POWERS and PURINA MILLS, INC.,

Defendant-Appellants/
Cross-Appellees,

and

MARTIN SMILEY and JAMES MILLER,

Defendants-Appellees.

UNPUBLISHED

No. 183073
Ingham Circuit Court
LC No. 93-073732-CK

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

TAYLOR, J. (concurring in part and dissenting in part).

I concur with the affirmance of the trial court's finding that plaintiff was the victim of race discrimination. Thus, I also concur with the majority's affirmance of plaintiff's lost past wages, mental distress damages, and attorney fees.[1] I dissent, however, from the affirmance of future damages because the award was an abuse of discretion under the facts of this case and I also dissent from the majority's reversal of the trial court's order granting summary disposition to Martin Smiley and James Miller.

The trial court initially awarded plaintiff $100,000 in exemplary damages but declined to award any future damages. After being persuaded that it could not award exemplary damages, the court reversed the exemplary damage award and also reversed its denial of future damages and awarded plaintiff $359,602[2] in future damages.

While future damages may be awarded when an employee is improperly fired, ordinarily future damages "should not be awarded unless reinstatement is impractical or impossible." *Riethmiller v Blue Cross*, 151 Mich App 188, 201; 390 NW2d 227 (1986). Further, reinstatement is the preferred remedy. *Stafford v EDS*, 749 F Supp 781, 785 (ED Mich, 1990). Here, the trial court abused its discretion in awarding front pay because it did not first determine that reinstatement was not a viable remedy. Notwithstanding the trial court's failure to address the feasibility of reinstatement, the majority concludes that reinstatement is not feasible. I believe it is improper for this Court to make such a determination in the first instance. This is a ruling that must initially be made by the trial court. Thus, I would remand to allow the trial court to make the necessary determination.[3]

Assuming arguendo that reinstatement is not feasible, I find that awarding twenty-eight years of front pay was an abuse of discretion because plaintiff failed to mitigate his damages. In order to mitigate damages, a plaintiff must make a reasonable good-faith effort to secure "like" employment. *Morris v Clawson Tank Co*, 221 Mich App 280, 287; 561 NW2d 469 (1997). If a plaintiff accepts a lower paying job and makes no further efforts to find a job that pays a wage that is comparable to the wage that was being earned when fired, a plaintiff fails to mitigate damages. *Id*. Here, plaintiff accepted a lower paying job and indicated that he intended to keep working for his new employer without also stating that he continued to seek a job that paid as much as his job with defendant had.[4] Mitigation involves reasonable efforts to obtain employment of a "like nature." *MERC v Kleen-O-Rama*, 60 Mich App 61, 64; 230 NW2d 308 (1975). Because the record indicates that plaintiff stopped seeking comparable employment, it is an abuse of discretion to award front pay.[5] A front pay award under such circumstances is an unmerited windfall. *Suggs v ServiceMaster*, 72 F3d 1228, 1233 (CA 6, 1996) (a Title VII plaintiff must mitigate damages and may not remain unemployed [or here underemployed] and collect a windfall).

Assuming arguendo that reinstatement is not feasible, and that plaintiff did mitigate his damages, I find that awarding plaintiff twenty-eight years of front pay was an abuse of discretion because the award was too speculative. Damage awards may not be based upon mere speculation and conjecture. *Reisman v Wayne State Regents*, 188 Mich App 526, 542; 470 NW2d 678 (1991). Front pay awards must be proved "with reasonable certainty." *Riethmiller*, *supra* at 202-203. In initially denying front pay, the court noted the following facts: (1) plaintiff only worked one year for Purina Mills before being fired; (2) in the two years preceding defendant's employment with Purina Mills plaintiff held a variety of temporary and short-term jobs; (3) the last permanent job plaintiff held before working for Purina Mills only lasted six weeks; and (4) plaintiff had been employed at at least four jobs over an eight-year period for an average of less than two years at each job. On the basis of these four factors, the court found it was unreasonable to assume plaintiff would have remained employed with defendant for the rest of his working life.

In later reversing itself and awarding front pay, the court relied upon the following: (1) plaintiff had worked for one employer for seven years and left for a good reason; (2) plaintiff had worked for his current employer for two years; (3) several witnesses at trial had been hired by defendant before plaintiff and were still employed with defendant; and (4) plaintiff had attempted to exercise administrative remedies to retain his job with defendant. In my opinion, the trial court's initial ruling was

correct and its ultimate ruling was clearly erroneous. Plaintiff had numerous jobs over a long period. On the facts of this case, it was undue speculation to determine that plaintiff would have remained employed by defendant for an additional twenty-eight years.

I also note that the trial court assumed plaintiff would have continued to work six hours a week of overtime at $16.83 an hour for the next twenty-eight years in calculating plaintiff's front pay award. This holding also was overly speculative even if plaintiff was otherwise entitled to front pay. Therefore, at a minimum, the amount front pay awarded plaintiff was $147,026.88 too high. ($16.83 multiplied by six hours multiplied by fifty-two weeks multiplied by twenty-eight years).

Finally, I dissent from the majority's reversal of the order of granting summary disposition to Smiley and Miller. The majority holds that Smiley and Miller may be liable under the Civil Rights Act even if they did not participate in the decision to terminate plaintiff. I disagree. I would affirm the trial court if for no other reason that plaintiff experienced no damages from his alleged discriminatory treatment by Smiley and Miller for which he is not already being compensated. Indeed, if plaintiff goes to trial against Smiley and Miller and prevails, any damages that he might obtain would have to be offset with the damages the majority is affirming here. Given that the majority is affirming an award in excess of $400,000, there can be no serious dispute that plaintiff has already been compensated for any discriminatory treatment he experienced during the one year that he was employed with defendant. Therefore, a reversal of the order granting summary disposition to Smiley and Miller is most unwarranted.

It is for these reasons that I would affirm in part and reverse in part.

/s/ Clifford W. Taylor

[1] I do not reach the issue whether plaintiff was employed as a just-cause employee and fired in the absence of just cause because the race discrimination finding is being upheld and the damages awarded are duplicative.

[2] The trial court appears to have determined that plaintiff had twenty-eight years until retirement and multiplied the years until retirement by the differential between what plaintiff had made at Purina Mills and the lesser amount he was making with a new employer (almost $13,000).

[3] See *Bruno v Detroit Institute of Technology*, 51 Mich App 593, 601; 215 NW2d 745 (1974) (the entire problem of future damages could be avoided if defendant were now willing to rehire plaintiff).

[4] Plaintiff was making $11.22 an hour when he was fired by defendant and was making $7.57 an hour at the time of trial with his new employer.

[5] See SJI2d 105.41 (if a plaintiff proves he was the victim of discrimination, the factfinder must reduce plaintiff's damages by what the plaintiff earned and by what the plaintiff could have earned with

reasonable effort); *Bruno*, *supra* at 599 (figure should be reduced by such sums plaintiff has earned or could have earned by reasonable efforts to secure employment in his chosen profession).